Filed 8/20/19 P. v. Guidino CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE GUDINO, Defendant and Appellant.	B282503 Los Angeles County Super. Ct. No. BA402855

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy and William N. Sterling, Judges. Affirmed.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jorge Gudino of the willful, deliberate, premeditated murder of Jose Zamarripa. The jury found gang and firearm allegations true. On appeal, Gudino does not challenge the evidence that he murdered Zamarripa. Instead, he raises three contentions: (1) the superior court erred during pretrial proceedings in denying Gudino's request for an in camera review of records produced in response to a subpoena he served on a nonparty, the Coalition to Abolish Slavery and Trafficking; (2) the trial court erred in denying his three *Batson/Wheeler* motions[1]; and (3) the trial court improperly pressured the jury to reach a verdict when—after deliberating for a few hours—it sent the court a note that it was at an impasse. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Gudino chases, shoots, and kills Zamarripa*

As Gudino does not contest the sufficiency of the evidence at trial, we only summarize it briefly.

On the evening of June 22, 2012, Jennifer Torres was at a park at 62nd and Halldale in South Central Los Angeles playing softball with some friends. She saw a man wearing boxers or shorts and no shirt running down the sidewalk. Another man with a gun in his right hand was running right behind him. Torres saw the second man shooting; she remembered "sparks," "like a flash." The first man "kind of threw himself under" "a big, big bush." The second man "caught him and just like shot him." He stood over the victim and fired two or three more times. The shooter then ran away.

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Miriam Dominguez was a member of the Florencia 13 gang with the moniker "Slick." She knew Zamarripa as "Chango" and Gudino as "Domer." Both were Florencia 13 members. Dominguez left the gang after Zamarripa's murder. In 2012, Dominguez hung out with Florencia 13 gang members every day. Both Zamarripa and Dominguez were "at the bottom" of the gang's hierarchy.

The gang operated "casitas"—places where people could gamble, "get girls," buy drugs and alcohol, and "just party." Zamarripa broke the gang's rules by robbing people who came to the casitas. According to Dominguez, "You can't rob them when they are in there because you're scaring away business, and you're taking money from whoever is running the casitas." Zamarripa also was fighting inside the casitas. That violated the rule not to scare away customers or "do anything [to] bring the cops." Zamarripa "really started messing up . . . a few months before his murder."

When Gudino arrived at the casita, people would stop smoking methamphetamine[2] and Tricky—the shot-caller who ran that casita—would take Gudino to a special room in the back. People at the casita were "really respectful" to Gudino.

A few days before the murder, two Florencia 13 gang members came to a residence on Halldale looking for Zamarripa. Dominguez had been living there for a couple of months. The house was "a crash pad" for Florencia 13 members. The men told Dominguez, "You know they are looking for your boy." "They just said that he was fucking up."

---

[2] One of the gang's rules was no one under 35 was allowed to smoke methamphetamine.

On June 22, 2012, Dominguez was in the living room of the Halldale house when Gudino and Zamarripa walked in. Gudino told Zamarripa, "Don't worry about it. It is a misunderstanding." Gudino "asked [Zamarripa] to step outside." Gudino went outside, followed by Zamarripa. Dominguez heard "popping" and ran to look out the kitchen window. Dominguez saw Gudino shooting at Zamarripa; then Zamarripa fell and Gudino ran toward the park.

Dominguez ran out of the house. Zamarripa was on the grass by a bush, "struggling to breathe and choking on his blood." Dominguez told "him that he was going to be okay"; she was "trying to help him" but "couldn't." She waited for police to arrive.

Los Angeles Police Department Officer Mario Fernandez and his partner drove to 62nd Street and Halldale. Fernandez saw a man lying on the ground and two women "standing next to him crying hysterically." The officers called for an ambulance. Other officers and detectives—including Detective Sean Hansen—arrived. Officers found five expended cartridge casings at the scene.

A coroner's examination of Zamarripa's body revealed five gunshot wounds: three to his head, one to his chest, and one to his right hand. All three shots to Zamarripa's head and the shot to his chest were fatal. Stippling on the chest wound indicated the gun was fired from 20 to 24 inches away. The coroner concluded Zamarripa "died as a result of being shot multiple times."

2. *Dominguez goes into witness protection*

Dominguez initially told police she hadn't seen what happened. She was "really confused" and "didn't want to snitch

on anybody." Dominguez saw Gudino's brother Pato at the casita the morning after the murder. Pato "pulled [Dominguez] outside" and told her he didn't care what she saw, but that he and Gudino "were not in that house that night." Pato told Dominguez she'd be "smoked"—killed—if she talked or cooperated. Dominguez went back to the Halldale house to get her belongings; she had no other place to stay. She tried to go to different casitas, but Tricky told her he thought she had "set [Zamarripa] up." Dominguez was sleeping in stolen cars; a few nights later someone shot at her from a passing car.

On August 2, 2012, police arrested Dominguez for stealing a car. Detective Hansen went to see her in jail. Dominguez had lied to Hansen the night of the murder; she was afraid if she told him the truth, something would happen to her family. After Hansen told Dominguez her family would be safe, she told him "what happened."

Dominguez was threatened by other inmates several times while in custody; when she was released Hansen put her in a witness protection program and took her to San Francisco. Hansen gave Dominguez money for food and "incidentals."

At some point, Dominguez received a Facebook message from a man called "Kilo," who said he was Gudino's counsin. Kilo told Dominguez "he wanted [her] to change her statement," and he offered her $5,000. Kilo instructed Dominguez to go to a lawyer's office, "change [her] statement and sign a paper." Gudino's wife then would hand her the money.

Dominguez took a bus from San Francisco back to Los Angeles and went to a lawyer's office in El Monte. Dominguez needed money to help her brother in Mexico. She didn't tell Hansen what she was doing. At the lawyer's office, a woman

whom Dominguez believed to be Gudino's wife, together with a man who said he was her brother, walked her into the office. Another man prepared a declaration and had Dominguez sign it. The woman she'd met there then gave her the money. They told her she "wasn't going to be green lighted no more."

Dominguez later told Hansen about the declaration and the money. Hansen put her back into witness protection, at a hotel in Torrance. Ultimately, Dominguez received the equivalent of $8,244.76, $2,830 of that in cash and $5,300 of it from the witness relocation program for lodging. In October 2013, Dominguez was arrested for identity theft; at that point, she no longer was in the witness protection program and she received no further funds from the government.

3. *The charges, verdicts, and sentence*

The People charged Gudino with Zamarripa's murder. The People alleged Gudino committed the crime for the benefit of, at the direction of, or in association with a criminal street gang. The People alleged firearm enhancements under Penal Code section 12022.53, subdivisions (b), (c), and (d).[3]

The jury convicted Gudino of first degree murder and found the gang and gun allegations true. The court sentenced Gudino to 50 years to life in the state prison.

---

[3] Statutory references are to the Penal Code, unless otherwise noted.

DISCUSSION

1. *Neither the pretrial court nor the trial court violated Gudino's rights by declining to conduct an in camera review of a third party's privileged documents*

a. *The defense pretrial subpoenas to CAST and its staff attorney, and the motion to quash*

Pretrial proceedings in this case consumed nearly four years, from April 2013 to March 2017. In February and March 2016, Gudino's attorney William Pitman served subpoenas duces tecum on the custodian of records for the Coalition to Abolish Slavery and Trafficking (CAST) and on a CAST staff attorney, Sara Van Hofwegen. The subpoenas required CAST and Van Hofwegen to produce all documents concerning communications between Detective Hansen (the investigating officer on the case) as well as the district attorney's office and CAST "relating to" CAST's "representation" of Miriam Dominguez.

On April 14, 2016, CAST's counsel, Munger, Tolles & Olson (MTO), provided "all responsive, non-privileged documents" to Pitman, together with a declaration by CAST's custodian of records under Evidence Code section 1561. The documents consisted of 30 pages of e-mails between Van Hofwegen and both Hansen and Deputy District Attorney Hilary Williams. MTO also gave Pitman a privilege log of documents CAST was declining to produce based on attorney-client privilege and the attorney work product doctrine.

Apparently Pitman viewed this response to his subpoenas as inadequate, because in October 2016 MTO—on CAST's behalf—filed a "motion to quash or modify" the subpoena. Van Hofwegen—represented by Latham & Watkins—filed a joinder in CAST's motion. Pitman opposed the motion.

Counsel appeared in the felony calendar court before Judge William N. Sterling on November 1, 2016. The court agreed with Pitman that "certain things" sought by the subpoenas were "clearly material." The court viewed the privilege log as insufficiently specific. Pitman said, "[T]he simple resolution would be for the court to review the file in camera." The court responded, "Well, I'm not ready to go there." The court continued, "Clearly, the overriding principle beyond anything is materiality and potential relevance. And I can't really tell from what's been submitted whether that's a possibility. . . . I would prefer a supplemental declaration from [MTO and Latham & Watkins] that . . . without revealing content that gave me some idea of what it's not about. You don't have to reveal what it is about to tell me what it's not about. . . . It's not about waiving any privilege."

CAST's counsel said the dispute over the subpoena was "really important precedent to CAST" because its clients were "often tangentially involved in" civil or criminal cases in which CAST attorneys' and caseworkers' files "could be the subject of discovery." The court responded that Gudino was charged with murder and was entitled to due process of law. The court stated, "An accusation of murder is every bit as serious as the protection of people who've been the victims of human trafficking. We have extraordinarily important competing interests potentially here." The court noted Pitman "would be entitled to information if it related to offers made . . . to Ms. Dominguez by the police or the prosecutor which hadn't already been revealed," "something . . . that may have to do with inducements offered to Ms. Dominguez."

The prosecutor stated she already had told Pitman "there were no offers or inducements by the prosecution in this case to anyone, including his client." She said Detective Hansen had "represented to [her] that nothing has been provided to Ms. Dominguez in this case for any type of testimony or security or otherwise. And what was provided to her has been disclosed, anything having to do with payment or consideration for her protection, movement, and that type of thing." On November 7, 2016, CAST's counsel, MTO lawyer Rose Ehler, filed a supplemental declaration. Ehler declared CAST's "attorney file document" contained 190 entries in 63 pages. Ehler stated 150 of the entries were "entirely non-responsive" and 40 contained "some potentially responsive material." Thirty-eight of the 40 entries "contain[ed] CAST attorney notations that are potentially responsive, at least in part." None of the 38 included any verbatim quotations from Detective Hansen or prosecutor Williams. Ehler declared, "None of these 38 entries/notations include[s] a promise, offer, or provision of legal benefits to Ms. Dominguez (neither in exchange for her testimony nor otherwise)."

Ehler wrote that the remaining two entries were work product. They included "copied-and-pasted text from email communications between Ms. Van Hofwegen and Detective Hansen," but CAST already had produced those "underlying communications." Ehler attached a redacted copy of an email exchange between Hansen and Van Hofwegen in which Hansen offered to put Dominguez "into protective custody" because of "threats" and Van Hofwegen told Hansen Dominguez did "not want to go into protective custody."

Counsel appeared again before Judge Sterling on November 18. Pitman continued to argue "this is a situation where the court should review the documents." Ehler cited *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*), for the proposition the court was not required to examine the documents in camera. Ehler noted her sworn declaration stated "there's no offer of leniency anywhere in that attorney file."

After further argument, the court ruled: "Balancing everything, including what the defense already knows and the assertions on behalf of Ms. Van Hofwegen [and CAST], at this point, I don't think it's appropriate, and I don't intend, to exercise my discretion to review the files." The court noted *Hammon* applied and provided "guidelines." The court stated Pitman was "a marvelous lawyer" "but it appears to me that this is a bit of a fishing expedition, that he's aware of a lot already. And I think that the declarations set forth are in good faith. And I don't think there's enough set forth for me to go beyond the face of the declarations to examine the file myself."

b. *Gudino did not establish good cause for an in camera review of Van Hofwegen's privileged and work product notations*

Without distinguishing the pretrial proceedings before Judge Sterling from the trial proceedings before Judge Kennedy, Gudino contends "the trial court's ruling" "declin[ing] to conduct an in camera review as requested by the defense" denied Gudino his federal and state constitutional rights. Without any citation to the record, Gudino states it "seems likely" "there was an agreement [between Dominguez and the prosecution] or even a promise of assistance that was not disclosed."

A defendant in a criminal case has a trial right under the confrontation clause "sometimes" to require witnesses "to answer questions that call for information protected by state-created evidentiary privileges." (*Hammon, supra,* 15 Cal.4th 1117, 1123-1124, citing *Davis v. Alaska* (1974) 415 U.S. 308.) Section 1326 authorizes a defendant to issue a subpoena for documents in accordance with Evidence Code section 1560, subdivision (b). (§ 1326, subd. (c).) The statute provides, "the court may order an in camera hearing to determine whether or not the defense is entitled to receive the documents." (*Ibid*.)

In *Hammon*, a defendant charged with sexual molestation subpoenaed records from psychotherapists who had treated the victim. The superior court quashed the subpoenas. Our Supreme Court "decline[d] to extend the defendant's Sixth Amendment rights of confrontation and cross-examination to authorize pretrial disclosure of privileged information." (*Hammon*, *supra*, 15 Cal.4th at pp. 1119, 1128.)

As we have said, there were extensive proceedings on the defense subpoenas to CAST and Van Hofwegen before Judge Sterling, who handled the case during its years of pretrial proceedings. The record reflects no reissuance of those subpoenas by Gudino's counsel for *trial*. As the Attorney General notes, there was some discussion before the trial court about Dominguez's involvement with CAST. In counsel's discussions with Judge Kennedy about potential cross-examination of Dominguz, Pitman told the court, "Unfortunately, Judge Sterling denied my motion to review the records in camera. I think that this court could do that, and we could have the records brought here from CAST and Van Hofwegen." Judge Kennedy said, "Well, I am not revisiting motions that Judge Sterling . . . ."

Pitman interrupted: "I understand. But there are e-mails. So there's some indication of contact between her lawyers and the detectives and the D.A.'s in this case." The court noted Pitman could ask Dominguez "if she has been promised anything or she is expecting any benefits with regard to her immigration case based upon her testifying in this case." The court also observed that Detective Hansen could be asked about this subject.

In any event, Judge Sterling did not quash Gudino's pretrial subpoenas as premature. Instead, the court conducted extensive proceedings. CAST already had produced all responsive documents that were not privileged, including all of the emails between or among Van Hofwegen, the LAPD (including Hansen), and the district attorney's office. Judge Sterling found MTO's privilege log inadequate and provided guidance about necessary supplemental declarations. The MTO lawyer for CAST, Rose Ehler, then provided a sworn declaration detailing what was—and was not—in Van Hofwegen's electronic file. Ehler declared under oath there was nothing in the privileged entries reflecting any offer, deal, promise, or inducement from police or prosecutors to Dominguez for her testimony or cooperation. Gudino cites to no evidence that Ehler was lying under oath, nor is there any reason to believe she was.

Nor did the trial court violate Gudino's rights by declining to conduct an in camera review of records Pitman had not subpoenaed for trial. " 'An accused . . . is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause.' " (*Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 Cal.App.3d 552, 566; cf. *People v. Gurule* (2002) 28 Cal.4th 557, 593 [psychiatric treatment records "were privileged by the

attorney-client privilege (Evid. Code, § 954) and thus not subject to in camera inspection or a balancing of their importance with defendant's interest in a fair trial"].) Again, Gudino presented Judge Kennedy with no evidence CAST had any documents that it had not already produced that showed any inducement to Dominguez.

Finally, any error in declining to conduct an in camera review of Van Hofwegen's electronic notes was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Before trial, Pitman was given all of the records of all payments made to and on behalf of Dominguez by the People. Hansen testified about those amounts, down to the penny. Pitman cross-examined Dominguez thoroughly: his questioning and her answers consume some 160 pages of reporter's transcript—roughly four hours of examination over the course of two days. The jury was made well aware of Dominguez's history of gang membership, extensive criminal record, and pattern of changing her story.

2. *The trial court did not violate Gudino's federal or state constitutional rights by denying his attorney's repeated* Batson/Wheeler *motions*

a. *Voir dire and the defense* Batson/Wheeler *motions*

Jury selection in this case took nearly a week. Defense counsel Pitman made several *Batson/Wheeler* motions; the trial court ultimately denied all of them. We summarize the answers given to the court's and counsel's questions in voir dire by the jurors at issue.

Juror 14

Juror 14 was a manager at a technology company. He had never been on a jury. Juror 14's nephew—age 26—was serving

time for assault with a firearm. Juror 14 came to court wearing a shirt that said "Donkey Kong is my spiritual animal."

Juror 25

Juror 25 was a director of business development for a construction management company. He had never been on a jury. Juror 25's first cousin had been convicted of murder about 15 years earlier in Florida. Juror 25's aunt—his cousin's mother—had called him "distraught" and "panicked." "Since I was the first one in my family to get a college degree, she reached out to me . . . for advice and strength and counsel, you know, to 'what do I do?' " Juror 25 had been "in constant contact" with his aunt. He didn't know if the case involved gangs. When asked if there were anything about his cousin's situation that would affect his ability to be impartial as a juror, Juror 25 responded, "I wouldn't think so." The court asked, "Would you decide this case based on the facts and not on sympathy or emotion?" Juror 25 answered, "Yes, I would definitely try."

In response to defense counsel's questions, Juror 25 said if a witness were to change her story several times, "it would be a red flag. Absolutely." If a witness had "receiv[ed] money from one side or another," "it would definitely raise suspicion."

The prosecutor asked Juror 25 if there was anything about his cousin's "experience that has changed or modified your view of the criminal justice system." Juror 25 replied, "Yes. I mean . . . short answer is he was offered a plea deal, and my aunt was persistent [*sic*] on taking it to trial. And he ended up getting a sentence that was twice as long. So . . . it took a while for us as a family to swallow that." "That was a tough pill to swallow." It was "very emotional. Draining." Juror 25 said he had supported his aunt financially and emotionally. Juror 25 said he "would do

[his] best to try to be impartial and listen to the facts as presented." When pressed by the prosecutor, Juror 25 added, "I think it is hard because . . . at that moment in that particular situation where a specific testimony [*sic*] or specific facts are revealed, until you are faced at that moment, you know, human nature might kick in and you might be sympathetic. But right now I have a clear head going into this." When the prosecutor asked a group of jurors if it would be "a tall order" to convict the defendant of murder, Juror 25 was "kind of nodding." Juror 25 said, "Like I said, having the experience with my cousin and getting the updates nightly from my aunt and how that particular day of trial went, I understand the emotional roller coaster that we are all about to go through."

Juror 27

Juror 27 was a doctor's assistant. She had never been a juror. The court told Juror 27, "I can't help but notice that you have unusual hair color compared to everyone else here in the courtroom." Juror 27 said, "Yes." The court continued: "Actually, I am kind of envious because I wouldn't have the nerve let's say to dye my hair green. But if I were your age I would give it some serious consideration." Juror 27 said, "I—use that as a conversation starter." She continued, "I have problems talking or starting conversations. . . . So it's easier if I have something that they can start the conversation with."

Defense counsel asked Juror 27 if she could express her opinion, listen to other jurors, and "participate in the give and take." Juror 27 replied, "Participating and expressing might be a bit hard for me. But because I have this anxiety and social problem, that makes me listen better because I tend to stay quiet and to the side. I can see and listen to other people better. But

as far as expressing and actually talking, if I have a strong opinion, I will share it with others."

Juror 57

Juror 57 worked for Federal Express at the airport. He had never been on a jury. On the second day of jury selection, Juror 57 was nearly an hour late to court, arriving close to noon. When the court asked him why, he replied, "I woke up late." The court said, "You woke up late?" Juror 57 answered, "Yeah." Juror 57 was 20 years old. He had grown up in, and lived in, South Central Los Angeles. He had heard of the Florencia gang but was not familiar with it.

In response to the prosecutor's questions, Juror 57 said he'd seen gang members from the area. "You know. I know who is what, and that's it. I mean no contacts with them or becoming friends . . . ." When asked how long he'd lived "above the jungles," Juror 57 said he grew up right there. The prosecutor asked, "Anything about those experiences that [is] going to affect your ability to be fair in a gang case?" Juror 57 replied, "Not necessarily. But I still have memories."

Juror 64

Juror 64 worked in armored transport. He had been pulled over by law enforcement a lot—"just random pulled over, I guess." The most recent traffic stop had been six months earlier. Officers told him the address associated with his license plate had "warrants for people that live there," but that was incorrect. The agency in question was the sheriff's department in La Puente. Juror 64 viewed the stops as unjustified and they bothered him. "Just with the sheriff department, when they drive behind me I know I am going to get pulled over." Officers

had searched his car. After the fifth time police pulled him over, Juror 64 thought they were harassing him.

Juror 64 had not filed a complaint but he would if it happened again. He "changed addresses" and the stops had not "happened after that." Juror 64 said he was not biased against law enforcement and could carefully and critically evaluate the evidence in the case. He didn't "blame the cops"—"they are probably doing their job."

Juror 64 had been a juror in a driving under the influence case. The jury could not reach a verdict. Juror 64 was in the majority. He thought the "case was common sense"; "there was only one person" holding out.

b. *The defense motions, the prosecutors' response, and the court's rulings*

The first motion

After the prosecutors exercised seven peremptory challenges—including challenges to Jurors 14, 25, 27, and 32[4]—defense counsel made a *Batson/Wheeler* challenge. Counsel contended four of the seven excused jurors (two men and two women) were Hispanic. Counsel noted Gudino was also Hispanic. The court stated it was unsure Juror 27 was Hispanic, but assumed for argument's sake that she was. The court stated,

---

[4] Gudino states on appeal that—even though trial counsel included Juror 32 in his motion—she "is not a subject of this argument." Juror 32's brother-in-law had gone to prison two or three months earlier for "attempted sexual contact with a minor." Juror 32 believed her sister when she said "he didn't do it"; he took a plea deal because he didn't think he'd get a fair trial.

Juror 32 also had two cousins who were gang members or associates.

"Okay, so let's just say that there are four Hispanics—I'm not sure as to the last one—out of seven. And it raises a question. Do you want to enunciate what your positions are with regard to these jurors?"

The prosecutor said Juror 14 had a nephew in prison on a weapons charge and was wearing a Donkey Kong T-shirt. The prosecutor stated she asked to have Juror 25 excused because he had a cousin who had been convicted of murder and "he constantly talked to his aunt . . . and what she had been going through losing her son to the justice system in that way." Her cocounsel added, "And how they didn't accept a plea bargain, and he got more time than he should have gotten, and they felt it was unfair." As for Juror 27, the prosecutor said, "[S]he has got bright green hair that immediately alerts me that she might be quite liberal. She is fairly young and somewhat unsophisticated, in my mind. She also talked about having anxiety."

The court said, "I will say that I am still not sure that she [Juror 27] is Hispanic, even looking at her now. . . . But I'm going to find that the reasons that have been stated by the prosecution are not race-based reasons for exercise of the peremptories that have been enunciated and challenged by you to this point."[5]

The third motion

The prosecution accepted the jury. Defense counsel continued to strike jurors. After both sides exercised two more peremptory challenges, the prosecution again accepted the panel.

---

[5] Pitman made a second *Batson/Wheeler* motion after the prosecution's next exercise of a peremptory challenge removed an African American juror. On appeal, Gudino states he does not challenge the court's ruling on this motion.

Pitman exercised another challenge, the court seated Juror 57, and the prosecutor then asked the court to excuse Juror 57. Defense counsel "renewed" his *Batson/Wheeler* challenge. Counsel said, "Juror No. 57 is a male Hispanic [and] there doesn't appear to be anything that I can tell that stands out with regard to him."

The prosecutor noted the People had accepted the jury with "five or six" Hispanic jurors. The prosecutor listed the jurors and the court confirmed, "Yes, all appear to be Hispanic." As for Juror 57, the prosecutor stated, "[W]e have a juror who is young, unsophisticated, lives in South Central L.A. And I don't know if the court recalls, he is one of the jurors that overslept." The court said it remembered. The prosecutor continued, "And what causes concern for us is not only in his demeanor and the way that he approaches answering questions, 'yeah'—you know, he has got some kind of unsophisticated attitude about him, but also the fact that he overslept. . . . He is one of these jurors that I think doesn't really care much about what's going on and kind of is running his own program. I have concerns that he may not be getting along with other jurors or may not work well [with] the other jurors."

The court ruled: "All right. I am going to find that is not an exercise for a racial motive and deny your motion at this time." Defense counsel stated there was only one male Hispanic juror in the box. The prosecutor responded there had been another male Hispanic juror the People accepted and Pitman then struck.

The fourth motion

The next day, after both sides exercised two more challenges each, the court seated—and the prosecution struck—

Juror 64. Defense counsel once again renewed his motion. Counsel stated, "I don't think there's any basis for this challenge other than the fact that he is a male Hispanic, a young male Hispanic." The prosecutor noted the last three male Hispanic jurors who had been excused had been removed by defense counsel. A lengthy colloquy between the court and counsel ensued. The prosecutor said, "[H]e has been stopped numerous times by the sheriffs for this warrant that apparently is attached to his address that he never attempted to cure. Constant contacts—and he says things out loud like, 'And they would identify people, passengers in my car.' It is obvious to me, whether or not he says he is going to hold it against officers who testify, I don't want someone on the jury who is constantly having that type of negative contact with law enforcement." The prosecutor added that Juror 64 had been on a hung jury; she seemed to suspect the majority (including Juror 64) had voted not guilty.

The court said it had found a prima facie case and "I am having a lot of trouble with your justification for this juror." The court noted Juror 64 never said he voted not guilty in his previous trial. The prosecutors pointed out the victim in this case and all of the People's witnesses also were Hispanic.[6] After further argument, the court ruled: "I am going to find that it was

---

[6] In *People v. Reynoso* (2003) 31 Cal.4th 903 (*Reynoso*), the court observed, "[B]oth the defendants *and the murder victim* were of Hispanic ancestry, a circumstance that might be viewed as neutralizing any suspected untoward belief on the prosecutor's part that Hispanic jurors would tend to be biased in favor of, and thereby be more inclined to vote to acquit, the Hispanic defendants." (*Id.* at p. 926, fn. 7.)

race neutral, having been stopped five times by the police in a short period of time. [Addressing defense counsel:] You are apparently making police testimony a big issue in this case. . . . I don't see how police testimony is going to be a big issue in this case, but according to your questions [in voir dire], apparently it is. . . . I don't see how the main thrust of the prosecution's case is going to be police testimony, but you're going over and over and over and over and over and over and over and over attitudes toward police, so apparently there is something there from the defense standpoint. So this is a critical issue. So I'm going to deny the *Wheeler* challenge."

c. *Substantial evidence supports the trial court's finding that the prosecutors provided genuine, race-neutral explanations for striking the five jurors*

In *Wheeler*, *supra*, 22 Cal.3d 258, the California Supreme Court " 'held that the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 116 (*Catlin*).) Eight years later in *Batson*, *supra*, 476 U.S. 79, " 'the United States Supreme Court held that such a practice violates, inter alia, the defendant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.' " (*Catlin*, at p. 116.)

A trial court follows this procedure and applies this standard when a defendant makes a motion challenging peremptory strikes: " 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts

gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' " (*People v. Avila* (2006) 38 Cal.4th 491, 541 (*Avila*), citing *Johnson v. California* (2005) 545 U.S. 162, 168.)

An appellate court reviews "the trial court's ruling on the question of purposeful racial discrimination for substantial evidence." (*Avila, supra,* 38 Cal.4th at p. 541.) We presume a prosecutor has used her peremptory challenges in a constitutional manner, and we give deference "to the [trial] court's ability to distinguish 'bona fide reasons from sham excuses.' " (*Ibid*.) " '[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reasons for exercising a peremptory challenge is being accepted by the court as genuine.' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 901 (*Hamilton*), quoting *Reynoso, supra,* 31 Cal.4th at p. 919.) " '[W]e review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "with great restraint." ' " (*Catlin*, *supra*, 26 Cal.4th at p. 117.) "As long as the court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.' " (*Avila*, 38 Cal.4th at p. 541.)

Jurors 14 and 25 had relatives in prison. The Supreme Court has recognized having a family member in prison as a race-neutral reason for excusing a juror. (*Hamilton, supra,* 45 Cal.4th at pp. 901, 906.) The prosecutor also referred to Juror 14's Donkey Kong T-shirt. As for Juror 27, the prosecutor cited her "bright green hair." The prosecutor added, "She is fairly young and somewhat unsophisticated, in my mind." As our Supreme Court said in *Hamilton*, "[w]e need not examine the objective reasonableness of the prosecutor's stated basis for the challenge of [the juror], namely his desire to exclude younger jurors. The proper focus of a *Batson/Wheeler* inquiry is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." "What matters is that the prosecutor's reason for exercising the peremptory challenge is legitimate. A ' "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.' " (*Hamilton*, *supra*, 45 Cal.4th at p. 903.)

Gudino argues the prosecutor accepted another juror whose relatives had been incarcerated and who was "nervous about being in court," suggesting the prosecution's striking of Jurors 14, 25, and 27 was race-based: "this rationale was not always applied by the prosecutor to non-Hispanic jurors." But the prosecutor *did* use a peremptory challenge to remove the juror Gudino identifies, Juror No. 51.[7]

---

[7] Gudino's confusion is understandable. The trial court used 18 numbered seats during jury selection. The court also gave the jurors numbers—in this case ranging from 1 to 95. As prospective jurors were excused for cause or by peremptory challenges, the court replaced those jurors with other jurors. So, for example, Jurors 20, 29, 42, 50, 58, 67, 83, and 95 all occupied

As for Juror 57, Gudino says "there was absolutely no *articulated* rationale justifying the strike." The prosecutor told the court she exercised a peremptory challenge as to Juror 57 because he was "young" and "unsophisticated," he overslept, he seemed not to "care much about what's going on," he "kind of is running his own program," and he might not work well with other jurors. Again, immaturity is a neutral reason supporting a peremptory challenge (*People v. Sims* (1993) 5 Cal.4th 405, 431 [prospective jurors' "apparent immaturity and inexperience with assuming weighty decisions and responsibilities"]; *People v. Neuman* (2009) 176 Cal.App.4th 571, 581 ["young college students, relatively inexperienced in life"]), as are disinterest in the proceedings, inattentiveness, and tardiness (*Reynoso, supra,* 31 Cal.4th at pp. 925-926 [prosecutor felt juror "was not paying attention to the proceedings" and "was not sufficiently involved in the jury selection process"]; *People v. Davis* (2008) 164 Cal.App.4th 305, 311-313 [juror was late and seemed confused]).

Gudino also contends the prosecutor's strike of Juror 57 was suspect because lateness "did not appear to be a problem for the prosecution as to other jurors." Gudino identifies only one "other juror": Juror 1. Juror 1 was a registered nurse who

---

seat No. 17 at some point. The court and counsel referred to the jurors by their numbers—Juror 20, Juror 50, and so on. But the court reporter referred to the jurors by seat number. So, for example, all eight of the jurors who sat in seat No. 17 are referred to in the reporter's transcript as "Juror 17." To track what happened to each of the 95 prospective jurors, the reader must go to the page in which the court seated each successive group of prospective jurors, then match up each juror's number with his or her seat number. We have done that.

worked in an emergency room. Juror 1 had cared for gang members as patients. The record does not reveal Juror 1's race or gender. On the fourth day of jury selection, Juror 1 was about half an hour late to court. (The court had ordered the jurors back for 9:00 a.m. the previous day; proceedings on the morning in question commenced at 9:30 a.m.) Juror 1 told the court, "I missed the train that would have gotten me here on time." When told he or she should have called, Juror 1 replied, "I did try calling and nobody picked up the phone. It went to the voice message."

In contrast with Juror 57, Juror 1 offered a legitimate excuse for being late and said he or she had called the court. Juror 57 arrived close to noon—nearly an hour late—and his only excuse was he "woke up late." He apparently did not bother to set an alarm, or even to call the court when he "woke up late." To the extent Gudino asks us to conduct a comparative juror analysis, his "proffered analysis fails to demonstrate purposeful discrimination." "[A] side-by-side comparison [of Jurors 1 and 57] reveals that they were not 'similarly situated.' " (*Avila*, *supra*, 38 Cal.4th at pp. 546-547.)

The prosecutors' removal of Juror 64 presents a closer question. The court expressed understandable frustration that the prosecutor had spent time "effectively rehabilitat[ing]" the juror and then stricken him. The court also did not agree with the prosecutor's assumption that Juror 64 had been one of the jurors voting to acquit the defendant in his prior trial that ended in a hung jury. Ultimately, however, the court denied the challenge, noting that defense counsel was making a very substantial issue of police credibility in the case and Juror 64 had been stopped repeatedly by police for no legitimate reason.

That a juror has suffered police harassment or had a negative experience with law enforcement is a legitimate, race-neutral challenge for a prosecutor to remove a juror (*Wheeler*, *supra*, 22 Cal.3d at p. 275; *People v. Lenix* (2008) 44 Cal.4th 602, 628; *People v. Turner* (1994) 8 Cal.4th 137, 171 (*Turner*)), as is prior experience serving on a deadlocked jury (*People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1108, 1114; *Turner,* at p. 170).

Finally, Gudino asserts the prosecutor "passed on" another juror who was Korean American, had been "subjected to a traffic stop during which the juror believed the officers were unduly aggressive," and had "negative feelings against law enforcement." Again, Gudino is mistaken. The prosecutor used a peremptory strike to remove that juror, Juror 50.

3. *The trial court did not coerce the jury to reach a verdict*

a. The jury sends out a note after deliberating for five and one-half hours

After approximately five days of jury selection, 11 days of testimony, and a day of instructions and arguments, the jury began deliberating at 9:20 a.m. on April 18, 2017. The jury went to lunch at 11:50 a.m., returned at 1:30 p.m., and recessed for the day at 3:40 p.m. The jury resumed deliberations at 9:10 a.m. the next day, April 19. Fifty minutes later—at 10:00 a.m.—the foreperson sent the court a note: "The jury is unable to reach a verdict and is at an impasse. Let us know how to proceed."

The court discussed the situation with counsel. The court then brought the jurors into the courtroom. The court told the jurors:

> "My sort of initial reaction to your note is, this trial lasted a month. And you folks have

> deliberated basically for a day, which isn't very long in terms of a deliberation. [¶] In addition, you have made no requests of the court such as for readback or any explanation of jury instructions, anything like that. I mean, I'm not saying that you folks haven't deliberated in good faith; I'm sure you have. But when you consider the length of time of the trial and the amount of evidence that was presented and so forth, a day of deliberation is not an inordinately long period of time. [¶] So generally in a situation such as this the court would want to know whether you feel there's anything further or additional that could be done that might assist the jury in reaching a decision such as readback of testimony or further instructions or possibly additional argument from the attorneys, something of that nature. And it might be something that you as a jury might want to discuss before you answer me; that is, a discussion of whether you think there's anything additional or further that might be of assistance."

The court asked the foreperson (Juror 2) what the juror thought about what the court had said. The foreperson responded, "My feeling is that there are certain jurors who feel very certain of their belief, one or the other, and I don't think any additional information will result in a unanimous verdict." The court asked how many votes the jurors had taken. The foreperson said "two and a half, I guess we'll say." The "half"

"was more of a discussion again of where people stood." The court asked if there had been "any change from one vote to the next in terms of the numbers." The foreperson answered, "[B]oth ways—well, yeah, there was a change. And then there was a change the other way again in the informal vote this morning."

The court stated,

> "Okay. Because it seems to me that this jury should continue to deliberate at this point; that you should think about, as a jury or as a particular juror even, if a particular juror has some feeling of whether there's anything further that the court could do. [¶] And I know you said that's your feeling, that there is nothing further that the court could do. But there may be other jurors that disagree with you on whether there's something further that the court can do. [¶] So what I would suggest is that you continue your deliberations and that you as a jury and as individual jurors think about whether there might be something further that could assist the jury in reaching a decision. I'm not saying that there is; I'm just saying it's something that should be considered. [¶] Because there was a lot of time that was spent on this case, and one day of deliberation, although it may seem very long to you—and you folks even left early yesterday; you left at like 3:45—it is not, as you know, a huge, long period of deliberation. [¶] So I'm going to ask that you think about what I have said . . . and

> if there is something that any of the jurors think[s] might be helpful, that you can . . . write a note to that effect. [¶] If all of the jurors are in agreement there is nothing further that would be helpful, then . . . you can write me that kind of a note. [¶] But I think that you should continue your deliberations at this point and see where you are. Okay?"

The foreperson answered, "Okay."

The jury resumed deliberations at 10:40 a.m. At 11:15 a.m. the jury sent the court a note asking, "How was the defendant first identified as a suspect in this case prior to Miriam Dominguez['s] interview on Aug. 3, 2012?" After conferring with counsel, the court wrote its response: "There was no evidence presented on this subject during the course of this trial."

The jury took a 90-minute lunch break then continued to deliberate for two hours and 15 minutes in the afternoon. The jury returned the next day and deliberated from 9:25 a.m. to noon and 1:30 to 2:00 p.m. before announcing it had reached a verdict.

b. *The trial court did not abuse its discretion in asking the jurors to continue deliberating*

Gudino contends the court's remarks amounted to an impermissible *Allen* charge[8] and "clearly, operated to 'displace the independent judgment of the jury in favor of considerations of compromise and expediency.' " This argument is meritless. The court did not pressure the jury to reach a verdict nor did it state or even imply that, if the jurors did not agree, the case would have to be retried. (Cf. *People v. Butler* (2009) 46 Cal.4th 847,

---

8 *Allen v. United States* (1896) 164 U.S. 492.

883.) The foreperson told the court the jurors' "half vote" "was more of a discussion again of where people stood," and that jurors had changed sides going "both ways." The court suggested the jurors consider whether there was anything further the court or counsel could do, such as a request for readback, further jury instructions, or additional argument. The court told the jurors, "So what I would suggest is that you continue your deliberations and that you as a jury and as individual jurors think about whether there might be something further that could assist the jury in reaching a decision. I'm not saying that there is; I'm just saying it's something that should be considered."

The court did mention the trial had "lasted a month" and the jurors had deliberated "basically for a day, which isn't very long." But this observation was accurate: after 12 days of testimony, jury instructions, and closing arguments, the jury had deliberated for fewer than six hours.

Section 1140 provides the jury cannot be discharged until it has rendered its verdict unless both parties agree or "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) "The determination whether there is a reasonable probability of agreement rests within the sound discretion of the trial court." (*People v. Harris* (2005) 37 Cal.4th 310, 363 (*Harris*); *People v. Debose* (2014) 59 Cal.4th 177, 209 (*Debose*); *People v. Proctor* (1992) 4 Cal.4th 499, 539.) The trial judge has wide discretion to decide whether the jury has had enough time to deliberate. (*People v. Dennis* (1998) 17 Cal.4th 468, 540.)

In *Debose*, after a two-month trial, the jury had deliberated for a day and a half before telling the bailiff it was deadlocked.

The court declared a recess for the afternoon and sent the jurors home to rest. The court ordered the jury to return the next morning, telling them if "after an additional period of time" their discussions were "fruitless" and there was nothing else the court could do to assist them in reaching a decision " 'then so be it.' " Our Supreme Court found no abuse of discretion: "There was nothing coercive about the court's actions. The court's main concern was that the jury had not deliberated for a sufficient amount of time in light of the length of the trial. The court did not urge the jury to reach an agreement, nor did it pressure the jury to secure a verdict. The court simply told the jury that if after an additional period of time it found further discussions fruitless and there was nothing else the court could do to assist the jury in reaching a decision, 'then so be it.' " (*Debose*, *supra*, 59 Cal.4th at p. 209.)

Similarly, here, the court told the jurors if they got to the point where they all were in agreement "there is nothing further that would be helpful," they could write the court "that kind of a note." And, here, as in *Debose*, the jury's continuation of its deliberations that day and the next "suggested 'that it had overcome whatever impasse it had reached' in its previous deliberations." (*Debose*, *supra*, 59 Cal.4th at p. 209.)

In short, the trial court did not abuse its discretion in asking the jurors to continue their deliberations. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 615-616 [trial court did not abuse its discretion when it ordered deadlocked jury that had deliberated for day and a half to continue deliberating, telling jurors " ' try your best' " and " 'if you can't [reach a verdict], you can't' "]; *People v. Peoples* (2016) 62 Cal.4th 718, 783 [court's statement that 21.5 hours of deliberation was a " 'drop in the

bucket' " was not coercive "given the totality of the circumstances"; court did not "cross[ ] the line from encouragement to coercion"]; *Harris*, *supra*, 37 Cal.4th at pp. 363-365 [court's refusal to declare mistrial after jury said three times it was deadlocked was not abuse of discretion; "court's comments did not insist that a verdict be reached"; "record reasonably support[ed] the court's determination that the jurors had not reached an impasse"]; *People v. Sandoval* (1992) 4 Cal.4th 155, 195-196 [court did not abuse its discretion in asking jurors to "put in a little more time" when they had deliberated for 14.25 hours after five-month trial even though none of the 12 jurors thought there was reasonable possibility of verdict].)

DISPOSITION

We affirm Jorge Gudino's conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.